88-769

No. _____

Supreme Court, U.S.
FILED
NOV 7 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1988

JANE HARLAN,

Petitioner,

vs.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, and its individual members thereof, Michael H. Figenshaw, John J. Greer, James L. Tyler, Karen E. Shaff, Marie Prince-Cohen, D. Carlton Shull, William C. Davison, Norman G. Bastemeyer, Mary Louise Petersen, and Carolyn Sloan, in their individual and official capacities; LARRY JACKSON, Deputy Commissioner of the Iowa Department of Human Services, and GORDON E. ALLEN, Special Assistant Iowa Attorney General, in their individual and official capacities,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Robert E. Sutton
Sutton & Kelly
1409 East Capitol Drive
Milwaukee, Wisconsin 53211
(414) 961-0802

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

1. Did the complaint of the petitioner set forth a cause of action under 42 U.S.C. § 1983?

2. Was the opinion of the Eighth Circuit affirming the dismissal of the action by the District Court erroneous?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
OPINION BELOW	2
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
I. THE COMPLAINT SET FORTH A CAUSE OF ACTION—A CLEAR AND DIRECT INFRINGEMENT OF PROTECTED FREE SPEECH UNDER COLOR OF LAW	4
II. THE OPINION OF THE EIGHTH CIRCUIT ERRONEOUSLY DECLINED TO ADDRESS THE PETITIONER'S CLAIM OF "BAD FAITH HARASSMENT OR OTHER EXCEPTIONAL CIRCUMSTANCES."	9
III. THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ERRONEOUSLY CONCLUDED THAT THE PETITIONER HAD CONCEDED THAT THE DEFENDANTS WERE IMMUNE	10
CONCLUSION	12
APPENDIX:	
A—OPINION OF EIGHTH CIRCUIT COURT OF APPEALS	App. 1- 4
B—JUDGMENT OF EIGHTH CIRCUIT COURT OF APPEALS	App. 5- 6
C—MEMORANDUM OPINION OF DISTRICT COURT	App. 7-12
D—JUDGMENT OF DISTRICT COURT	App. 13
E—ORDER OF DISTRICT COURT	App. 14

TABLE OF CONTENTS—Continued

Page

F—COMPLAINT ..... App. 15-26

G—NOTICE OF APPEAL ..... App. 27

H—DOCKET SHEET ..... App. 28-29

I—AFFIDAVIT OF PLAINTIFF ..... App. 30-40

TABLE OF AUTHORITIES CITED

Page

CASES:

Brandenburg v. Ohio, 395 U.S. 444 (1969) 5

Cantwell v. Connecticut, 310 U.S. 296 (1940) 5

Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975) 5, 10

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 9, 10

Dombrowski v. Pfister, 380 U.S. 479 (1965) 5, 10

Fair Assessment In Real Estate v. McNary, 454 U.S. 100, 70 L.Ed.2d 271 (1981) 7

Fiske v. Kansas, 274 U.S. 380 (1927) 5

Gitlow v. New York, 268 U.S. 652 (1925) 5

Healy v. James, 408 U.S. 169 (1972) 5

Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979) 5, 10

McNeese v. Board of Education, 373 U.S. 668 (1963) 8

Middlesex County Ethics Committee v. Garden State Bar Association, 457 U.S. 423, 73 L.Ed.2d 6, 102 S.Ct. 2515 (1982) 9, 10

Monroe v. Pape, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961) 8

NAACP v. Button, 371 U.S. 415 (1963) 5

New York Times v. Sullivan, 376 U.S. 254 (1964) 5

Pennzoil Co. v. Texaco, Inc., 107 S.Ct. 1519 (4/6/87) 8

Shelton v. Tucker, 364 U.S. 479 (1960) 5

Stromberg v. California, 283 U.S. 359 (1931) 5

Terminiello v. City of Chicago, 337 U.S. 1 (1949) 4, 5, 10

TABLE OF AUTHORITIES CITED—Continued

Page

Thornburgh v. American College of Obstetricians & Gynecologists, 106 S.Ct. 2169, 90 L.Ed.2d 777 (1986) 8, 10

Thornhill v. Alabama, 310 U.S. 88 (1940) 5

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) 5

Whitney v. California, 274 U.S. 359 (1927) 5

Zwickler v. Koota, 389 U.S. 241 (1967) 5, 6, 10

STATUTES:

28 U.S.C. § 1254 2

42 U.S.C. § 1983 6

42 U.S.C. § 1988 11

No. _____

In The

Supreme Court of the United States

October Term, 1988

JANE HARLAN,

Petitioner,

vs.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, and its individual members thereof, Michael H. Figenshaw, John J. Greer, James L. Tyler, Karen E. Shaff, Marie Prince-Cohen, D. Carlton Shull, William C. Davison, Norman G. Bastemeyer, Mary Louise Petersen, and Carolyn Sloan, in their individual and official capacities; LARRY JACKSON, Deputy Commissioner of the Iowa Department of Human Services, and GORDON E. ALLEN, Special Assistant Iowa Attorney General, in their individual and official capacities,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the Decision of the United States Court of Appeals for the Eighth Circuit filed August 12, 1988.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit affirmed the decision of the United States District Court for the Southern District of Iowa, the Honorable Lyle E. Strom presiding, dismissing the complaint of the petitioner. The opinon of the Eighth Circuit is set forth in the Appendix, pp. 1-4 and the decision of the District Court is set forth in the Appendix, pp. 7-12.

———o———

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

———o———

STATEMENT OF THE CASE

The petitioner, Jane Harlan, is an attorney duly licensed and admitted to practice in the State of Iowa with offices located in Newton, Iowa. On March 22, 1985 upon petition she was appointed to act as guardian-ad-litem for five children in proceedings before the Juvenile Court in the Fifth Judicial District of Iowa.

The case concerned a dispute between a natural mother and foster parents and the Iowa Department of Human Services as to the appropriate placement and custody of the five children. The case became a clause celebre in Iowa and eventually commanded the attention of the national press including the CBS magazine program—*60*

Minutes. Proceedings in the case continued through 1985, 1986, and 1987 and the petitioner came to be interviewed in both the local Iowa press and on local and national television. The state trial court declined to terminate the parental rights of the natural mother or place the children with the foster parents and the petitioner acted as counsel on appeal of that decision to the Supreme Court of Iowa.

In January, 1987, while the appeal was pending in the Iowa Supreme Court a complaint was filed against the petitioner with a grievance committee of the Iowa Bar Association by respondents, a Special Assistant to the Attorney General, Gordon Allen, and a Deputy Commissioner of the Iowa Department of Human Services, Larry Jackson, complaining of public statements made by the petitioner which were allegedly critical of various public officials.

The petitioner responded to the complaint in February, 1987 and asserted a First Amendment defense. In August, 1987 the Committee on Professional Ethics and Conduct of the Iowa State Bar Association sent notice to the petitioner of a public reprimand. The petitioner thereupon filed the action which is the subject of this case in the United States District Court for the Southern District of Iowa on August 31, 1987. (Appendix, pp. 15-26)

The respondents, Committee on Professional Ethics and Conduct of the Iowa State Bar Association and the individual members of the Committee filed a Motion to Dismiss the complaint by date of September 18, 1987. The respondents, Allen and Jackson, also filed a Motion to Dismiss by date of September 22, 1987. Briefs were submitted by the parties and on October 30, 1987 the District Court rendered its memorandum opinion dismissing the

Complaint. (Appendix, pp. 7-12) From that opinion and subsequent order and judgment entered November 2, 1987 (Appendix, pp. 13-14) an appeal was taken to the United States Court of Appeals for the Eighth Circuit. (Appendix, p. 27) After the submission of briefs and presentation of oral argument the United States Court of Appeals for the Eighth Circuit issued its opinion on August 12, 1988. (Appendix, pp. 1-4)

REASONS FOR GRANTING THE WRIT

"A function of free speech under our system of government is to invite dispute. It may indeed better serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that arises far above public inconvenience, annoyance, or unrest." *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949).

I.

THE COMPLAINT SET FORTH A CAUSE OF ACTION—A CLEAR AND DIRECT INFRINGEMENT OF PROTECTED FREE SPEECH UNDER COLOR OF LAW.

The nature of the free speech infringement in the instant case is clearly of the type traditionally protected by the First Amendment under decisions of the United States

Supreme Court from early date. *Fiske v. Kansas*, 274 U.S. 380 (1927), *Stromberg v. California*, 283 U.S. 359 (1931), *Gitlow v. New York*, 268 U.S. 652 (1925), *Whitney v. California*, 274 U.S. 359 (1927), *Brandenburg v. Ohio*, 395 U.S. 444 (1969), *New York Times v. Sullivan*, 376 U.S. 254 (1964), *Thornhill v. Alabama*, 310 U.S. 88 (1940), *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

The infringement here is a direct abridgement of speech which, although perhaps provocative and challenging, is protected. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). Also see *Zwickler v. Koota*, 389 U.S. 241 (1967), *NAACP v. Button*, 371 U.S. 415 (1963), *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

The "environment" of the particular case as noted to be important in *Healy v. James*, 408 U.S. 169 (1972), *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) and *Shelton v. Tucker*, 364 U.S. 479 (1960) in the case at bar is the vigorous debate surrounding an ongoing civil legal matter. To censure the legal counsel for speaking out on the matter is to clearly abridge free speech in a most fundamental sense. It is that concept that underlies the holding of the Circuit Courts of Appeals of the Fourth and Seventh Circuits in *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) and *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975) in directly striking down rules of professional conduct which attempt to prohibit or restrict comments made by attorneys in the course of *civil* litigation. Such rules inhibit free speech, restrict reasonable public debate, and have a chilling effect. Cf. *Zwickler v. Koota*, 389 U.S. 241 (1967), *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

When such infringement is under color of law by action of agents of the state the victim may certainly obtain redress via an affirmative action in the United States District Court.

42 U.S.C. 1983 provides:

> "Every person, who, under color of any statute, ordinance, regulation, custom or useage, of any state or territory subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress." 42 U.S.C. § 1983.

The petitioner brought the instant action against the respondents for violation of her First Amendment rights under color of law. The vindication of rights arising under the United States Constitution and federal laws is primarily for the federal courts. There is a duty which rests upon all levels of the federal judiciary to vindicate the First Amendment rights of a citizen in the face of oppression thereof. In *Zwickler v. Koota,* 389 U.S. 241 (1967) Justice Brennan declared:

> ". . . escape from that duty is not permissible merely because State Courts also have the solemn responsibility equally with the federal courts . . . 'to guard, enforce and protect every right granted or secured by the Constitution of the United States.' *Robb v. Connolly,* 111 U.S. 624, 637, 4 S.Ct. 544, 551, 28 L.Ed. 542. 'We yet like to believe that wherever the Federal Courts sit, human rights under the Federal Constitution are always a proper subject for adjudication and that we have not the right to decline the exercise of that jurisdiction simply because the rights may be adjudicated in some other forum.' "

In *Fair Assessment In Real Estate v. McNary*, 454 U.S. 100, 70 L.Ed.2d 271, 275 Mr. Justice Rehnquist observed:

> "Obviously § 1983 cut a broad swath. By its terms it gave a federal cause of action to prisoners, taxpayers or anyone else who was able to prove that his constitutional or federal rights had been denied by any state. In addition, the statute made no mention of any requirement that state remedies be exhausted before resort to the federal courts could be had. . . ."

Justice Rehnquist goes on to discuss those areas where abstention or deference has been found appropriate.

Justice Brennan in his concurring opinion, in *Fair Assessment* at footnote 11, 70 L.Ed.2d 288 states that the congressional policy pronouncement of the role of the federal courts in the federal system was born of a "more than a modest distrust of the state courts as protectors of federal rights." He notes that "Where Congress has granted the federal courts jurisdiction we are not free to repudiate that authority."

It is with this background that the appropriateness vel non of the District Court's conclusion that it lacked subject matter jurisdiction over the action must be viewed. The circumstances in the case at bar as set forth in the Complaint supplemented by the verified affidavit submitted clearly established that the petitioner was claiming a course of conduct by the respondents of harassment, bad faith and retaliation against her. There were no ongoing state court proceedings such as criminal prosecutions in which the federal court was requested to intrude. The harassment and sanction by reprimand by the respondents

was a fait accompli. The Supreme Court of Iowa had issued its reprimand on October 15, 1987.

Also of great significance is the well accepted principle that when the unconstitutionality of the particular state action under challenge is clear, a federal court need not abstain from addressing the constitutional issue in lieu of some other reviews availability. See *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S.Ct. 2169, 90 L.Ed.2d 777, 801 (1986). Certainly First Amendment rights have traditionally been considered with a reverance equal to those rights of privacy recognized and secured in *Thornburgh*. As Justice Blackman indicates in *Thornburgh* federal courts have a duty to apply the federal Constitution faithfully. Also see Justice Blackman concurring in *Pennzoil Co. v. Texaco, Inc.*, 107 S.Ct. 1519 at p. 1534 (4/6/87).

Since *Monroe v. Pape*, 365 U.S. 167, 5 L.Ed.2d 492, 81 S.Ct. 473 (1961) immediate resort to federal court has been authorized whenever state actions allegedly infringe constitutional rights and the state has not been allowed the confession and avoidance defense that it has a review process which if followed would afford relief.

> "It is immaterial whether conduct is legal or illegal as a matter of state law. Such claims are entitled to be adjudicated in the federal courts."

McNeese v. Board of Education, 373 U.S. 668, 674 (1963).

II.

THE OPINION OF THE EIGHTH CIRCUIT ERRONEOUSLY DECLINED TO ADDRESS THE PETITIONER'S CLAIM OF "BAD FAITH HARASSMENT OR OTHER EXCEPTIONAL CIRCUMSTANCES."

In *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 73 L.Ed.2d 6, 102 S.Ct. 2515 (1982). Justice Rehnquist repeatedly asserts that a federal claim may be made out against whosoever might be responsible for injury to the First Amendment rights of an attorney *where there is bad faith, harassment or other exceptional circumstances.* This "bad faith" exception to lack of subject matter jurisdiction is recognized by implication by Justice Brennan in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) in footnote 16. *Feldman* is the case relied upon by the District Court in dismissing the complaint in the case at bar. The complaint in the case at bar specifically alleged a course of harassment and bad faith by the respondents.

In addition—perhaps more importantly—*District of Columbia Court of Appeals v. Feldman* did not involve First Amendment infringement claims—it involved bar *admission* rules and decisions. Justice Brennan specifically notes those allegations in the complaints that involved a general attack on the constitutionality of the Rules were *properly within* the subject matter jurisdiction of the Federal District Court. See 75 L.Ed.2d 206 at pp. 225-226.

It is respectfully submitted that had *Feldman* involved allegations of concerted course of conduct harassing the

applicants and infringing their First Amendment rights the holding would have confirmed the subject matter jurisdiction of the lower federal courts.

The District Court erred in concluding that it lacked subject matter jurisdiction over the action and the Opinion of the Eighth Circuit erred in declining to address the error of the District Court. The District Court had misapplied the holdings of the United States Supreme Court in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) and by implication *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982) and ignored the holdings of *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) and *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975). A proper er consideration of that case law and the traditional concepts of First Amendment law embodied in *Zwickler v. Koota*, 389 U.S. 241 (1967), *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), *Dombrowski v. Pfister*, 380 U.S. 479 (1965) and *Thornburgh v. American College of Obstetricians & Gynecologists*, 106 S.Ct. 2169, 90 L.Ed.2d 777, 801 (1986) compelled reversal of the District Court.

III.

THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT ERRONEOUSLY CONCLUDED THAT THE PETITIONER HAD CONCEDED THAT THE DEFENDANTS WERE IMMUNE.

In this respect the opinion of the Court of Appeals is perplexing, without precedential support, and contrary to the record. Although the District Court opinion had concluded that the defendants were immune from an award

of damages against them there was no holding that declaratory judgment or injunctive relief would be unavailable to the petitioner in the event she should prevail. Further and more importantly, the record discloses that the petitioner had filed a Notice of Appeal from the entire Opinion, Order, and Judgment of the District Court and, accordingly, was challenging the decision in its entirety. (Appendix, p. 28-29) Whether or not the respondents enjoyed immunities, qualified or absolute from *damages* would not bar the petitioner from declaratory judgment or injunctive relief and attorneys' fees under 42 U.S.C. § 1988. In addition there was no concession that the respondents enjoyed any immunity even from damages. Certainly the respondent Larry Jackson, the Deputy Commissioner of the Iowa Department of Human Services was not, by virtue of his employment, cloaked with any heretofore recognized immunity. If he was ultimately found to have injured the petitioner's First Amendment rights under color of law there is no precedent for absolving him from an award of damages.

In essence the opinion of the Eighth Circuit begged the question before it and avoided addressing the core issue by invoking a heretofore unrecognized doctrine of issue preclusion by waiver when there was no waiver of record.

———o———

CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue to review the Opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

ROBERT E. SUTTON
SUTTON & KELLY
1409 East Capitol Drive
Milwaukee, Wisconsin 53211
(414) 961-0802

Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2619

Jane Harlan Appellant, v. The Committee on Professional Ethics and Conduct of the Iowa State Bar Association, and its individual members thereof, Michael H. Figenshaw; John J. Greer; James L. Tyler; Karen E. Shaff; Marie Prince-Cohen; D. Carlton Shull; William C. Davison; Norman G. Bastemeyer; Mary Louise Petersen and Carolyn Sloan, in their individual and official capacities; Larry Jackson, Deputy Commissioner of the Iowa Department of Human Services, and Gorden E. Allen, Special Assistant Iowa Attorney General in their individual and official capacities, Appellees.	)	Appeal and Cross-Appeal from the United States District Court for the Southern District of Iowa.

No. 87-2702

Jane Harlan,
Appellee,

v.

The Committee on Professional Ethics and Conduct of the Iowa State Bar Association, and it individual members thereof, Michael H. Figenshaw; John J. Greer; James L. Tyler; Karen E. Shaff; Marie Prince-Cohen; D. Carlton Shull; William C. Davison; Norman G. Bastemeyer; Mary Louise Petersen and Carolyn Sloan, in their individual and official capacities,

Appellants,

Larry Jackson, Deputy Commissioner of the Iowa Department of Human Services, and Gorden E. Allen, Special Assistant Iowa Attorney General in their individual and official capacities.

Submitted: June 16, 1988
Filed: August 12, 1988

Before HEANEY and MAGILL, Circuit Judges, and LARSON,* Senior District Judge.

---

* THE HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

PER CURIAM.

I. INTRODUCTION

Jane Harlan (Harlan) appeals the district court's[1] dismissal of her lawsuit against the Committee on Professional Ethics and Conduct of the Iowa State Bar Association (the Committee) for want of subject matter jurisdiction. Finding no error in law or fact, we affirm.

II. FACTS

Harlan, an Iowa attorney, was appointed guardian ad litem for five children in proceedings to determine custody and placement. After an Iowa juvenile court judge determined that the children's mentally-ill mother should be given custody instead of the foster parents, Harlan criticized that judge in the local media. As the case became a local (and later national) cause celebre, Harlan continued to publicly criticize various state officials, including the juvenile court judge who awarded custody, and the appellate judges hearing the appeal of the award of custody. While the appeal was pending, a grievance was filed against Harlan with the Committee, alleging that she had violated professional ethics by criticizing the juvenile court judge and state officials. Harlan responded by asserting a First Amendment defense. The Committee rejected Harlan's First Amendment claims, and sent her notice of their recommendation of public reprimand. The notice informed her that if she failed to challenge the Committee's decision within thirty days,

[1]The Honorable Lyle E. Strom, Chief Judge, United States District Court for the Southern District of Iowa.

the reprimand would be spread upon the records of the Iowa Supreme Court. *See* Iowa Supreme Court Rule 118.3. Harlan did not challenge the Committee's recommendation, either through the administrative procedures prescribed by the Iowa Supreme Court, or in the United States Supreme Court. As a result, a final order of Public Reprimand was entered by the Iowa Supreme Court on October 15, 1987. Harlan then filed this 42 U.S.C. § 1983 action for derogation of her First Amendment rights. The district court dismissed her lawsuit on the alternative grounds (1) that allowing Harlan's lawsuit to go forward would involve federal district court review of the Iowa Supreme Court's decision to censure a member of the Iowa Bar, a result prohibited by the doctrine of absention, and (2) that all the defendants were entitled to absolute immunity. This appeal followed.

III. DISCUSSION

Harlan has not challenged the district court's finding that the Committee and its individual members were absolutely immune from liability for damages. Her failure to do so precludes this court from re-examining the issue of immunity on appeal, *see Rubek v. Barnhart*, 814 F.2d 1283, 1285 (8th Cir. 1987), or overturning the district court's dismissal on immunity grounds, and thus is fatal to her appeal.

In view of this disposition, it is unnecessary to address Harlan's objection to the district court's conclusion regarding the doctrine of abstention.

We have considered appellee's request for Fed. R. Civ. P. 11 sanctions and do not find that they are war-

ranted in this case. Accordingly, the district court's decision dismissing Harlan's lawsuit is in all respects affirmed.

A true copy.

ATTEST: /s/ Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 87-2619

Jane Harlan, Appellant, v. The Committee on Professional Ethics and Conduct of the Iowa State Bar Association, and its individual members thereof, Michael H. Figenshaw; John J. Greer; James L. Tyler; Karen E. Shaff; Marie Prince-Cohen; D. Carlton Shull; William C. Davison; Norman G. Bastemeyer; Mary Louise Petersen and Carolyn Sloan, in their individual and official capacities; Larry Jackson, Deputy Commissioner of the Iowa Department of Human Services, and Gorden E. Allen, Special Assistant Iowa Attorney General in their individual and official capacities, Appellees.	)	87-619-B Appeal and Cross-Appeal from the United States District Court for the Southern District of Iowa.

No. 87-2702

Jane Harlan, Appellee, v.	)
The Committee on Professional Ethics and Conduct of the Iowa State Bar Association, and its individual members thereof, Michael H. Figenshaw; John J. Greer; James L. Tyler; Karen E. Shaff; Marie Prince-Cohen; D. Carlton Shull; William C Davison; Norman G. Bastemeyer; Mary Louise Petersen and Carolyn Sloan, in their individual and official capacities, Appellants,	)
Larry Jackson, Deputy Commissioner of the Iowa Department of Human Services, and Gorden E. Allen, Special Assistant Iowa Attorney General in their individual and official capacities.	)

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

August 12, 1988

Appellees (Committee on Professional Ethics and Conduct) will recover from the appellant the sum of $54.42 for taxable costs on appeal.

Appellees (Gordon Allen and Larry Jackson) will recover from appellant the sum of $34.80 for taxable costs on appeal.

A True Copy.

ATTEST: /s/ Robert D. St. Vrain
CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JANE HARLAN,	)	
	)	
Plaintiff,	)	CV. 87-619-B
	)	
v.	)	
	)	
THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, et al.,	)	MEMORANDUM OPINION
	)	
Defendants.	)	

This matter is before the Court on the following motions to dismiss: the Committee on Professional Ethics and Conduct of the Iowa State Bar Association (the Ethics Committee) and the individual members of that Committee (Filing No. 3), and Gordon Allen and Larry Jackson (Filing No. 5). The defendant Ethics Committee has also filed a motion for Rule 11 sanctions against the plaintiff (Filing No. 3).

The controversy in this case concerns attorney disciplinary proceedings which culminated in the public reprimand of plaintiff, Jane Harlan. Gordon Allen and Larry Jackson, state officials, initiated the complaint with the Committee on Professional Ethics and Conduct of the Iowa State Bar Association[1] on January 27, 1987, alleging that

---

[1] The Ethics Committee members are commissioners of the Supreme Court of Iowa, and are authorized to initiate, receive and process complaints filed against attorneys licensed to practice law in Iowa. Iowa State Court Rule 118.2.

plaintiff, Jane Harlan, violated various provisions of the Iowa Code of Professional Responsibility.

Harlan was notified of the complaint and responded to it on February 13, 1987. Harlan's response denied any unethical conduct and raised a First Amendment defense to the complaint. The Ethics Committee, following an investigation, voted to discipline Harlan by a reprimand. Harlan was notified of the decision of the Committee on August 26, 1987, and was informed that she had thirty days to challenge the decision. If no exceptions were filed within the thirty days, the reprimand would be forwarded to the Clerk of the Iowa Supreme Court and spread upon the records of that Court as a public reprimand. *See Iowa Supreme Court Rule* 118.3.

The Iowa Supreme Court Rules provide that if a reprimand is challenged, no report of the reprimand shall be made to the Clerk of the Court and the reprimand shall be stricken from the records. *Iowa Supreme Court Rule* 118.3.[2] Harlan failed to challenge the Committee's decision which would have stricken the reprimand from the records and prevented the Committee from filing the reprimand with the Iowa Supreme Court. Her failure to challenge the decision of the Committee has now resulted in a final order of reprimand being entered by the Iowa Supreme Court on October 15, 1987.

---

[2] The rule further states: "The Committee on Professional Ethics and Conduct may, however, proceed further with any complaint against such attorney before the Grievance Commission. When a reprimand has been filed but exception is duty taken thereto, such reprimand shall not be admissible in evidence in any hearing before the Grievance Commission." *Iowa Supreme Court Rule* 118.3.

In considering a motion to dismiss under Fed.R.Civ.P. 12(b)(6), allegations in the complaint must be viewed in the light most favorable to plaintiff. *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted). "Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations which show on the face of the complaint that there is some insuperable bar to relief." *Jackson Sawmill Co. v. United States*, 580 F.2d 302, 306 (8th Cir. 1978), *cert. denied*, 439 U.S. 1070 (1979).

States have a strong interest in regulating their state bars as lawyers are "essential to the primary governmental function of administering justice." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). Recognizing this important state interest, the United States Supreme Court has noted that "orders of a state court relating to the admission, discipline and disbarment of members of its bar may be reviewed only by the Supreme Court of United States on certiorari to the state court and not by means of an original action in a lower federal court." *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983) (*quoting MacKay v. Nesbitt*, 412 F.2d 846 (9th Cir. 1969).

The *Feldman* case concerns state court regulation of attorneys. The Court held that United States District Courts lack subject matter jurisdiction to review state court decisions made in judicial proceedings. *Feldman*,

460 U.S. at 486. The Court stated that this rule holds even when constitutional claims exist if these claims are inextricably intertwined with the state court's decision in a judicial proceeding. *Id.* at 483-84 n.16.

The only exception recognized in *Feldman* is when a plaintiff does not directly challenge a state judicial decision or raise a claim which is inextricably intertwined with a judicial decision. In such an instance, a United States District Court may hear the case. In the area of attorney discipline, challenges to the constitutionality of state bar rules, for example, do not necessarily require a district court to review a final state court judgment. In such case, the district court would be called upon to simply assess the validity of a state rule promulgated in a nonjudicial proceeding. In such a case, the district court would not be reviewing a state court judicial decision and could properly hear the case. *Id.* at 486.

In this matter, however, Harlan's challenge is to a state court decision arising out of judicial proceedings.[3] For this Court to hear plaintiff's claim it would be, in essence, reviewing a final state court judgment. The United States District Courts do not have jurisdiction over challenges to state court decisions in cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional. *Id.* at 486. *See also, Michaelis v. Nebraska State Bar Association*, 717

---

[3] The proceedings in this matter involved a judicial inquiry in which the Committee, acting on behalf of the Iowa Supreme Court, "was called upon to investigate, declare and enforce 'liabilities as they [stood] on present or past facts and under laws supposed already to exist.'" *Feldman*, 460 U.S. at 479, *quoting Prentis v. Atlantic Coastline Co.*, 211 U.S. 210, 226 (1908).

F.2d 437 (8th Cir. 1983). Review of this matter in a federal court may be had only in the United States Supreme Court. 28 U.S.C. § 1257. As this matter called for the review of a final state court decision arising out of judicial proceedings, this Court lacks subject matter jurisdiction and must dismiss this action.

Apart from the question of this Court's jurisdiction in this matter, defendants have raised the issue of immunity. Defendant Ethics Committee claims absolute quasi-judicial immunity barring plaintiff's § 1983 and 1985 claims for damages. Defendants Jackson and Allen claim that absolute immunity is conferred upon them by Iowa Supreme Court Rule 118.19 which states in part:

> Members of the Grievance Commission, members of the Committee on Professional Ethics and Conducts, and their respective staffs shall be immune from suit for any conduct in the course of their official duties.

The Iowa Supreme Court has interpreted that this rule's intent and purpose is to "protect complainants, witnesses, members of the Grievance Commission, members of the Committee on Professional Ethics and Conduct, and their respective staffs from retaliatory litigation by investigated lawyers . . . ." *State v. Baker*, 293 N.W.2d 568, 576 (Iowa 1980).

It is clear that the defendants in this action are immune from liability for damages for filing the complaint and for assisting with the investigation (defendants Allen and Jackson) and for the processing of the complaint and disciplinary action (defendant Ethics Committee).

As this Court lacks subject matter jurisdiction over this action, the defendants' motions to dismiss will be

granted. The Court, however, will deny defendant Ethics Committee's motion for Rule 11 sanctions against the plaintiff. A separate order will be entered in accordance with this opinion.

DATED this 30th day of October, 1987.

BY THE COURT:

/s/ Lyle E. Strom
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF

JANE HARLAN

v.

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, et al

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 87-619-B

[ ] *Jury Verdict.* This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] *Decision by Court.* This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that defendants' motions to dismiss are granted and plaintiff's complaint is hereby dismissed.

NOVEMBER 2, 1987
Date

JAMES R. ROSENBAUM
Clerk

/s/ Pat Bridges
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

JANE HARLAN,	)	
	)	
Plaintiff,	)	CV. 87-619-B
	)	
v.	)	
	)	
THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, et al.,	)	ORDER
	)	
Defendants.	)	

Pursuant to the memorandum opinion entered herein this date,

IT IS HEREBY ORDERED that defendant's motions to dismiss are granted and plaintiff's complaint is dismissed.

IT IS FURTHER ORDERED that defendant Ethics Committee's motion for sanctions is overruled.

DATED this 30th day of October, 1987.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

JANE HARLAN,
Plaintiff,
vs.

CIVIL ACTION
File No. 87-619-B
(Jury Trial Demanded)

The COMMITTEE OF PROFESSIONAL ETHICS OF THE IOWA STATE BAR ASSOCIATION and its individual members thereof, Michael H. Figenshaw, John J. Greer, James L. Tyler, Karen E. Shaff, Marie Prince-Cohen, D. Carlton Shull, William C. Davison, Forman G. Bastemeyer, Mary Louise Petersen, and Carolyn Sloan, in their individual and official capacities; LARRY JACKSON, Deputy Commissioner of the Iowa Department of Human Services, and GORDON E. ALLEN, Special Assistant Iowa Attorney General in their individual and official capacities,

Defendants.

COMPLAINT

1.

This is an action for declaratory and injunctive relief and damage pursuant to Article VI of the United States Constitution and 42 U.S.C. Secs. 1983, 1985, and 1988. Jurisdiction is predicated on the foregoing provisions of the law and further upon 28 U.S.C. 1331 and 1343 and Article III of the United States Constitution. The amount in controversy exclusive of interests and costs exceeds $10,000.00.

2.

JANE HARLAN is an adult citizen of the United States residing in the Southern District of Iowa and at all

times material herein was an attorney in good standing duly admitted and licensed to practice the profession of law.

3.

The members of the Committee on Professional Ethics and Conduct of the Iowa State Bar Association are appointed commissioners of the Supreme Court of Iowa to initiate or receive and process complaints against any attorney licensed to practice law in this state for alleged violations of the Iowa Code of Professional Responsibility for Lawyers and laws of the United States or the State of Iowa.

4.

Michael H. Figenshaw, John J. Greer, James L. Tyler, Karen E. Shaff, Marie Prince-Cohen, D. Carlton Shull, William C. Davison, Norman G. Bastemeyer, Mary Louise Petersen, and Carolyn Sloan are all adult citizens and residents of the State of Iowa. At all times material herein they did collectively comprise the Committee on Professional Ethics and Conduct of the Iowa State Bar Association with offices located at 1101 Fleming Building in the City of Des Moines, Polk County, Iowa. Said Committee was at all times material herein empowered by the Supreme Court of Iowa to initiate or receive and process complaints against any attorney licensed to practice law in this state.

5.

LARRY JACKSON is the Deputy Commissioner of the Iowa Department of Human Services with offices at

the Hoover State Office Building in Des Moines, Polk County, Iowa.

6.

GORDON E. ALLEN is a special assistant to the Iowa Attorney General with offices at the Hoover State Office Building in Des Moines, Polk County, Iowa.

7.

JANE HARLAN is engaged in the practice of law in an office located at 300 Midtown Building in the City of Newton, Jasper County, Iowa, and was engaged in said practice at all times material herein.

8.

On January 27, 1987, LARRY JACKSON and GORDON ALLEN filed a complaint concerning JANE HARLAN with the Committee on Professional Ethics and Conduct of the Iowa State Bar Association attached as Exhibit 1.

9.

All actions actually engaged in by the plaintiff constituted protected free speech and thus could not form the basis for disciplinary action. Said protected speech ultimately resulted in nationwide publicity of the mistreatment of children in the custody of the State of Iowa, and legislation improving their status.

10.

Said disciplinary action was initiated in bad faith to retaliate against the plaintiff for having exercised her

First Amendment Rights in criticizing public officials, public agencies, public policies, and for reporting on testimony which took place in public courtrooms.

11.

On February 13, 1987, the plaintiff filed an answer to the complaint against her which is hereinafter attached as Exhibit 2 raising her First Amendment defense to said complaint.

12.

On August 26, 1987, the plaintiff received correspondence from the Committee on Professional Ethics and Conduct of the Iowa State Bar Association indicating that she would be reprimanded for her conduct unless she took further action. All of the conduct complained of in the Committee's decision involved protected speech and is attached as Exhibits 3 and 4.

13.

Any further proceedings of the Committee will be brought not with any genuine expectation of their eventual success, but only to discourage the exercise of the plaintiff's protected rights, and presumably deter others who might otherwise be inclined to speak out.

14.

The Committee has no legitimate interest in prosecuting the disciplinary charges against the plaintiff. Its only real interest is in retaliating against the plaintiff and chilling her further speech.

15.

The acts of the defendants in this matter were under the color of law and in violation and contravention of the rights of the plaintiff under the Constitution of the United States and the First and Fourteenth Amendments thereof.

16.

The defendants and each of them knew or in the exercise of reasonable care should have known that their conduct was violative of the rights of the plaintiff. Because of the specialized knowledge and education of the defendants, the plaintiff believes that the participation of the individual defendants was reckless, malicious, and vindictive.

17.

As a direct and proximate result of the actions of the defendants, the plaintiff has sustained and continues to sustain severe damage and injury to her property and professional reputation, sustained disruption and injury to her employment, sustained extreme mental pain and emotional suffering and has been required to defend against the proceedings against her to her damage in the amount of $250,000.

WHEREFORE, plaintiff demands relief against the defendants and all of them jointly and severally as follows:

1. Declaratory and injunctive relief directing that the defendants have heretofore violated the constitutional rights of the plaintiff and enjoining the defendants from such violation and infringement in the future.

2. For compensatory damages in the amount of $250,000.00.

3. For punitive damages in the amount of $750,000.00.

4. For costs, disbursements and attorney's fees pursuant to the provisions of 42 U.S.C. Sec. 1988.

5. For such further relief as may be appropriate. Dated August 31, 1987.

Respectfully submitted,

/s/ Jane Harlan
Jane Harlan, pro se
300 Midtown Building
Newton, Iowa 50208
(515) 792-9934

THE IOWA STATE BAR ASSOCIATION

COMPLAINT

RE: Jane Harlan of Monroe, Iowa.

Grievance Commission
Iowa State Bar Association
1101 Fleming Building
Des Moines, Iowa 50309

We, Gordon E. Allen and Larry Jackson, upon best information and belief, hereby complain that Jane Harlan, whose address is 300 Midtown Building, Newton, Iowa, 50208, has violated the Rules, Ethics and Conduct of the Legal Profession. As background information, Ms. Harlan was appointed pursuant to Iowa Code § 232.89 as counsel and guardian ad litem for five children involved in a child-in-need-of-assistance proceeding before the Jasper County Juvenile Court. Those children were placed in the custody of the Department of Human Services and thereafter placed in foster care. Statutory review hearings of that disposition were held, with Ms. Harlan participating throughout the proceedings as guardian ad litem for the children.

Upon hearing that the Department intended to change the foster care placement pursuant to a plan to reunify the children with their natural mother, Ms. Harlan, on behalf of those children, filed in October of 1986, a motion requesting the Jasper County Juvenile Court to enjoin that change in foster placement. Ms. Harlan also filed on behalf of the children a petition to terminate the parental rights of the natural mother. Pending hearing on the petition, all parties agreed that no change in placement would occur. The petition was denied after hearing, and

filed December 31, 1986. Shortly after the entry of that order, the Department of Human Services changed the foster care placement.

Continuing since August 1986, in derogation of statutory and appellate remedies available to her clients, Ms. Harlan, assertedly on their behalf, has pursued extra-judicial remedies in the Governor's office and the court of public opinion by repeatedly requesting assistance with and commenting upon this case with members of the local and national media.

Specifically, it is believed Ms. Harlan has violated the Rules of Ethics and Conduct in the following respects:

In violation of DR7-107(G), Ms. Harlan, has continually, during the course of the juvenile court litigation, made or participated in making extra-judicial statements relating to the evidence, the character and credibility of parties and witnesses and her opinion as to the merits of the claims or defenses of these parties. Upon best information and belief, Ms. Harlan has commented repeatedly in the *Des Moines Register*, and has made comments on various radio "call-in" shows, including WHO in Des Moines and the Jim Fisher Show in Davenport. In addition, Ms. Harlan has contacted the Governor's Office and staff directly, demanding the Governor's involvement in this judicial proceeding. Inappropriate comments were made at local NOW chapter meetings and even the local K-Mart.

Much of the information released and publicly discussed, in violation of DR 1-102, was obtained from records protected as confidential under Iowa Code § 232.147, § 237.9, and §§ 235A.15 and .17, to which she had access

as court-appointed guardian ad litem. Her comments, reported in the *Des Moines Register,* disclosed facts regarding the natural mother's mental health history and the children, and information about those children contained within child abuse records. Subsequent to December 31, 1986, Ms. Harlan disclosed to local and national media the time and date of the children's move to different foster care placement and thereafter the location and circumstances of their new foster care placement. This is not an exhaustive list of specific examples.

In summary, but most importantly, Ms. Harlan's willingness to pursue extra-judicial remedies does substantial disservice to the integrity of the judicial system, violates the trust and confidence placed in her by the Juvenile Court, and ultimately is counterproductive to the children whose best interests she was appointed to protect.

Respectfully submitted,

/s/ Gordon E. Allen
Gordon E. Allen
Special Assist. Attorney General

/s/ Larry Jackson
Larry Jackson
Deputy Commissioner
Department of Human Services

JANE A. HARLAN
Attorney At Law
300 Midtown Building • Newton, Iowa 50208
Phone: (515) 792-9934
February 13, 1987

Grievance Commission
Iowa State Bar Association
1101 Fleming Building
Des Moines, Iowa 50309

Re: Answer to Complaint of
Larry Jackson and Gordon Allen

Dear Sir or Madame:

The complaint of Gordon Allen and Larry Jackson should be dismissed as frivolous because it is filled with inaccuracies, and represents an unethical effort to silence counsel in violation of her First Amendment Rights.

The inaccuracies are as follows:

1. No public statements about the case were made before the end of October, 1986.

2. No confidential information has been released by counsel. All factual statements have been based on public courtroom hearings and can be verified by transcripts. No items from confidential files have even been mentioned in the media by counsel with the exception of her description of Karen Cooper as having a "long history of mental illness." That fact was clearly brought out numerous times in a public courtroom. Ms. Cooper's relatives and attorney made many more damaging comments than anything attributed to this attorney.

3. All comments by counsel have dealt with public information, public agencies, public issues, and public policies within the protection of the First Amendment.

4. The national and local media were aware of the date and time of the children's move several hours before counsel. Upon information and belief the media camped at the Mick home for several days waiting for the move. Mrs. Mick was televised receiving the call in which that information was conveyed.

5. Counsel has not released the circumstances and location of the new foster home placements. Upon information and belief the media is not aware of the location at the present time. The circumstances or potential circumstances were released by the children and Larry Jackson of the Department of Human Services.

The First Amendment rights of attorneys concerning pending litigation are well established as evidenced by the attached opinion of Hirschkop vs. Snead, 594 F. 2d 356, (1979). Perhaps your committee should examine the ethical conduct of public officials and attorneys who file frivolous complaints in order to harass their adversaries.

/s/ Jane Harlan
Jane Harlan

THE
IOWA STATE BAR ASSOCIATION

Committee on Professional
Ethics and Conduct
Norman G. Bastemeyer, Administrator
1101 Fleming Building
Des Moines, Iowa 50309
1-515-243-3179

August 24, 1987

PERSONAL AND CONFIDENTIAL

Ms. Jane Harlan
Attorney at Law
300 Midtown Building
Newton, Iowa 50208

In Re: Our File No. 8687-189

Dear Ms. Harlan:

The above complaint against you came on for consideration by the Committee at its recent hearing meeting.

Following review of the allegations contained in the complaint, your response thereto, the Committee's investigation, and the file, it was the determination of the Committee that you be and hereby are publicly reprimanded for your conduct in making extrajudicial statements relating to the evidence, the character and credibility of the parties and witnesses and your opinion as to the merits of the claims or defenses of parties to a matter in which you appeared as the attorney for certain minor children, in violation of Disciplinary Rule DR 7-107(G); and for your conduct in making statements to the press concerning the judge hearing that matter, in violation of DR 8-102(B).

Your conduct as above described is also in violation of Canon 1 of the Iowa Code of Professional Responsibility for Lawyers as well as Disciplinary Rule DR 1-102(A)(6).

FOR THE COMMITTEE ON
PROFESSIONAL ETHICS
AND CONDUCT

/s/ Norman G. Bastemeyer

NGB/vle
Cert. P 707 166 049

THE IOWA STATE BAR ASSOCIATION

(SEAL)

Iowa Supreme Court
Grievance Commission
Carl V. Nielsen, Secretary
Cathy Kelly, Administrative Assistant
1101 Fleming Building
Des Moines, Iowa 50309
1-515-243-3179

August 24, 1987

Ms. Jane Harlan
Attorney at Law
300 Midtown Building
Newton, Iowa 50208

In Re: Our File No. 8687-189

Dear Ms. Harlan:

Pursuant to Supreme Court Rule 118.3, enclosed find a letter from the Committee on Professional Ethics and Conduct reprimanding you.

You hereby are notified that you have thirty (30) days from receipt of this letter to file exceptions with the Secretary of the Grievance Commission, 1101 Fleming Building,

Des Moines, Iowa, 50309, and if such exceptions are not filed within said period, the reprimand will be forwarded to the Clerk of the Supreme Court and spread upon the records of the Court as a public reprimand.

For your information, we are enclosing a copy of Supreme Court Rule 118.

/s/ Carl V. Nielsen
Carl V. Nielsen, Secretary
Grievance Commission

CVN/vle
Enclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DIISTRICT OF IOWA
CENTRAL DIVISION

JANE HARLAN,

Plaintiff,

vs. Civil No. 87-619-B

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, and its individual members thereof, Michael H. Figenshaw, John J. Greer, James L. Tyler, Karen E. Shaff, Marie Prince-Cohen, D. Carlton Shull, William C. Davison, Norman G. Bastemeyer, Mary Louise Petersen, and Carolyn Sloan, in their individual and official capacities; LARRY JACKSON, Deputy Commissioner of the Iowa Department of Human Services, and GORDON E. ALLEN, Special Assistant Iowa Attorney General, in their individual and official capacities,

Defendants.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN THAT JANE HARLAN, plaintiff above named hereby appeals to the United States Court of Appeals for the Eighth Circuit from the decision and order dated October 30, 1987, of the United States District Court for the Southern District of Iowa, the Honorable Lyle E. Strom, judge presiding.

Dated at Newton, Iowa, November 30, 1987.

1409 E. Capitol Drive
Milwaukee, Wisconsin 53211
(414) 961-0802

SUTTON & KELLY
Robert E. Sutton
Attorneys for Plaintiff

300 Midtown Building
Newton, Iowa 50208
(515) 792-9934

/s/ Jane Harlan
Jane Harlan, pro se

I hereby certify that I mailed a copy of the Notice of Appeal in the attorneys of record as are listed on the docket in this case. James R. Rosenbaum, Clerk By:

/s/ L. (ILLEGIBLE), Deputy Clerk

District 863, Off. 4, Doc. No. Yr. 87-0619, Or. 1
Filing Date 8/31/87 j 3, Nature Suit 440, $ Demand Thou. 1,000,
Judge 6711, County 19099, Jury Dem. P Yr. 87, Doc. No. 619-B

CAUSE: PLAINTIFFS

HARLAN, JANE

JURY

Sep. 17, 1987 864-3421

ASSIGNED TO
JUDGE LYLE STROM
U. S. DISTRICT JUDGE
P. O. Box 607
Omaha, NE 68101

All Judge's copies to be mailed

DEFENDANTS
THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF the IOWA STATE BAR ASSOCIATION and its individual members thereof, Figenshaw, Michael H.; Greer, John J.; Tyler, James L.; Shaff, Karen E.; Prince-Cohen, Marie; Shull, D. Carlton; Davison, William C.; Bastemeyer, Norman G.: Petersen, Mary Louise, and Sloan, Carolyn, in their individual and official capacities; JACKSON, LARRY, Deputy Commissioner of the Iowa Department of Human Services, and ALLEN, GORDEN E., Special Assistant Iowa Attorney General in their individual and official capacities

CAUSE
(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)
Civil Rights action filed under Sections 42 U.S.C. 1983, 1985 and 1988.

JANE HARLAN (Pro Se)
Attorney at Law
300 Midtown Building
Newton, Iowa 50208
(515) 792-9934

Robert E. Sutton (9/28/87)
Sutton & Kelly
1409 E. Capitol Drive
Milwaukee, WI 53211
(414) 961-0802

Attorneys for def. Committee on Prof. Ethics & Its Individual members:
James Gritzner
Nyemaster . . . law Firm
1900 Hub Tower
Des Moines, IA 50309
283-3145

for defs. G. Allen &
L. Jackson:

Thomas J. Miller, Atty. Gen.
Eleanor Lynn, Asst.
Tort Claims Division
Hoover State Office Bldg.
Des Moines, IA 50319
281-5881

STATISTICAL CARDS

CARD	DATE MAILED
JS-5	8/31/87
JS-6	11/ 2/87

Civ. #87-619-B

Date	NR	Proceedings
		Harlan, Jane Committee on Professional Ethics IA State Bar, et al.
8/31/87	1	Complaint. Jury Demand. Summons issued.
8/31/87	2	Application for Preliminary Injunction.
9/18/87	3	M/Dismiss and For Rule 11 Sanctions (Oral Argument Requested) by Comm. on Prof. Ethics . . . & individual members.
9/18/87	4	Brief in Support of Def. Committee & Its Members' M/Dismiss . . .
9/23/87	5	M/Dismiss by defs. Allen & Jackson.
9/23/87	6	Memo. in Support of M/Dismiss of Defs. Allen & Jackson.
9/28/87	7	Notice of Appearance and Notice of Associate Counsel.
9/28/87	8	M/Withdraw Application for Prelim. Injunction.
9/29/87	9	Order granting m/withdraw app. for prelim. inj.; all briefs in support of or opposition to defs.' m/dismiss & for Rule 11 sanctions by 10/20/87. /s/ Strom J. Copy to attys.

10/20/87	10	Memo of Pltf. in Opposition to Mnts. of all Defs. to Dismiss and for Rule 11 Sanctions.
10/20/87	11	Affidavit of Pltf.
11/ 2/87	12	Memorandum Opinion—As this Court lacks subject matter jurisdiction over this action, the defts' motions to dismiss will be granted. The Court will deny deft. Ethics Committee's motion for Rule 11 sanction against the pltf. /s/ Lyle E. Strom, Judge. Copies to Counsel.
11/ 2/87	13	Order—It is hereby Ordered that defts' motions to dismiss are granted and pltf's complaint is dismissed. It is Further Ordered that deft. Ethics Committee's motion for sanctions is overruled. /s/ Lyle E. Strom, Judge. Copies to Counsel. 153-OJ-8.
11/ 2/87	14	Judgment—It is Ordered and Adjudged that defts' motions to dismiss are granted and pltf's complaint is dismissed. /s/ JRR, Clerk. Pat Bridges, Deputy Clerk. Copies to Counsel. 153-OJ-9.
11/30/87	15	Pltf's Notice of Appeal.

I hereby certify that I mailed a copy of the Notice of Appeal to the attorneys of record as are listed on the docket in this case. James R. Rosenbaum, Clerk By: /s/ L.....(ILLEGIBLE) ....., Deputy Clerk

PLEASE NOTE:
PROCEEDING ON
CLERK'S RECORD — Send original and one copy of designation to Des Moines wth copy to Circuit.
PROCEEDING ON
APPENDIX and original to Ck. with two copies to Des Moines.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

JANE HARLAN,

Plaintiff,

vs.

Cv. 87-619-B

THE COMMITTEE ON PROFESSIONAL ETHICS AND CONDUCT OF THE IOWA STATE BAR ASSOCIATION, et al.,

AFFIDAVIT OF PLAINTIFF

Defendants.

STATE OF IOWA)
) SS.
COUNTY OF JASPER)

Jane A. Harlan, being duly sworn, deposes and states:

1. I am the plaintiff in the above-entitled action.

2. I am an attorney licensed to practice law in the State of Iowa since 1984 with offices at 300 Midtown Building, Newton, Iowa 50208.

3. On March 22, 1985, I was appointed the attorney and guardian ad litem for five minor children, Anna, Amanda, Sarah, Samantha, and Justin Cooper. I represented the children in the Jasper County Juvenile Court until I was removed on February 17, 1987, and still represent them before the Iowa Supreme Court.

4. My first comments in the media concerning my child clients appeared on October 30, 1986. At that time I described the testimony of two of the children in a public courtroom in the spring of 1985. I further criticized the treatment of my clients by the Iowa Department of Human Services. In every instance my statements were accurate, truthful, and involved public information.

5. Gerald Fuerhelm, the attorney for the natural mother, was quoted in the Des Moines Register on October 31, 1986. He told of a "substantiated incident" of abuse on the part of his client involving information straight from the confidential files of the Iowa Department of Human Services. On subsequent occasions he told of his client's treatment history for mental illness. He also entertained my child clients at his home and at Walt Disney's World on Ice without my knowledge or consent. No disciplinary action was ever instituted against him even though he clearly released confidential information, violated ethical rules, and was featured in the media at least as much as what I was.

6. District Associate Judge Thomas Mott, who handled the children's case, never directed me to not talk to the media concerning the case, or even discussed with me the propriety or accuracy of any of my public comments before April of 1987. At that time discussion centered on my public comments about him, not anything concerning the children.

7. On November 18, 1986, I was quoted in the press as stating that I couldn't understand why I was being sued by the natural mother since I had only told of events occurring in a public courtroom.

8. Subsequent comments were confined almost entirely to discussing the issues surrounding the case without giving direct information from any source.

9. On January 5, 1987, I told the press that I would appeal the court's decisions concerning my clients. I was critical of the actions of the Department of Human Services in the press when my clients were removed from their foster home on January 8, 1987.

10. On January 7, 1987, I filed the notice of appeal on the children's case.

11. Iowa Governor Terry Branstad announced on television on or about January 19, 1987, that I should be investigated for my conduct on the case. Upon information and belief the Governor is a graduate of Drake University Law School and a licensed attorney.

12. On January 27, 1987, the complaint involved in this action was sent to the Grievance Commission of the Iowa Bar Association signed by Gordon Allen, Special Assistant to the Attorney General, and Larry Jackson, Deputy Commissioner of the Iowa Department of Human Services. Neither party contacted me in advance to taking this action or objected to the accuracy of anything that I had said. The filing of this complaint caused me considerable anguish partly because it interfered with my ability to focus on the children's appeal.

13. On January 23, 1987, I met with Doug Gross, an assistant to Governor Branstad, concerning the case because I thought that it was not improper to petition the Governor concerning the actions of a state agency. At no

time did I release any information from any confidential file that was not publicly available.

14. On February 13, 1987, I responded to the Bar Complaint against me and raised my First Amendment defense. I enclosed a copy of *Hirschkop v. Snead,* 594 F.2d 356 (1979).

15. Any statement that I made at either a public meeting or to my personal friends was accurate and limited to public information.

16. The fact that the complaint mentions what I might have said at K-Mart demonstrates harassment on the part of state officials. Such statements would have been beyond the legitimate concern of the Bar Association. Such information was obviously acquired by investigation and interrogation.

17. On February 16, 1987, a hearing was held in Jasper County Juvenile Court on a motion filed by the State requesting that I be removed as the children's attorney. The motion was granted at least in part because of false findings by the Court that I had released confidential information about the case. No proof of this had been offered into evidence.

18. On March 16, 1987, I met with Megan Antenucci from the Grievance and Ethics Committee. I gave her copies of transcripts from the public hearings to verify that everything stated by me and repeated by the press was public information. I also pointed out that the confidential files in the case did not even contain what I had talked about, except that the natural mother had been mentally ill and neglectful of the children. Those facts

had been brought out many times in a public courtroom. I brought to the attention of Ms. Antenucci the unconstitutionality of the disciplinary rules relied on and cited authority for that position. Ms. Antenucci stated that the grievance committee could perhaps be persuaded to stay their proceedings against me until after a decision had been reached on the suit against me by the natural mother and my First Amendment rights had been tested in an Iowa court. I also told her how employees of the Department of Human Services and District Associate Judge Thomas Mott had harassed me while I was working on the appeal. My visits with my clients had been monitored. I had been fired as the children's attorney based on erroneous findings for which no evidence had been introduced. I was given no opportunity to rebut the court's findings which raised issues for the first time which had not been discussed at the hearing.

19. On March 23, 1987, Associate District Judge Thomas Mott issued an order where my fees on the children's case were reduced from $5,700.00 to $500.00 for 95 hours of service since May 20, 1986. I described this action in the media as "retaliation" which I firmly believe it was. This was the only time in which I was directly critical of the court in the media.

20. The reply brief on the children's appeal was due on August 3, 1987, and submitted on schedule. On August 18, 1987, the Iowa Supreme Court directed me to explain my authority to represent the children on appeal.

21. Six days later, on August 24, the Bar Association sent me its decision to publicly reprimand me after 30 days if I did not resist. No hearing or opportunity to defend

their allegations had been provided. On August 31, 1987, I filed this action in Federal Court. On September 3, 1987, I wrote a letter to the Bar Association objecting to the unconstitutionality of the rules that I was being reprimanded under. Under the rules of the Professional Ethics and Conduct Committee timely exception to the reprimand should have prevented submission of the reprimand to the Supreme Court at that time.

22. On August 31, 1987, I replied to the Iowa Supreme Court concerning my authority to represent the children on appeal. I cited the questionable circumstances of my removal at the District level and that I remained the attorney of choice for my clients. I also moved for an expedited appeal.

23. On September 15 the Iowa Supreme Court ordered that oral argument take place on October 13, and it proceeded on schedule. However my visit to my clients on October 8 was both monitored and videotaped by state officials.

24. The Order of Public Reprimand was issued by the Iowa Supreme Court on October 15, 1987, exactly two days after oral argument on the children's appeal. The documents sent to me are attached. I feel that the Bar not only violated my constitutional rights; it also violated its own rules of procedure concerning my right to a hearing. I also feel that this was a deliberate effort on the part of the Bar to distract me from completing the children's appeal and discredit me with the Supreme Court right when the children's case was submitted.

25. The actions of the defendants in this matter were part of a pattern of harassment engaged in by state offi-

cials under color of state law to intimidate me for asserting my client's rights, appealing their case, and criticizing the Governor and Iowa Department of Human Services.

26. I had a single conversation with Defendant Gordon Allen in about the middle of January, 1987. He complained about my "ethics", but did not indicate any intentions concerning the filing of a grievance. He did not challenge the accuracy of any of my statements.

27. The defendant Larry Jackson had no contact with me whatsoever.

28. Defendant members of the Bar Ethics Committee knew or should have known that the complaint against me was frivolous and unlawful. They proceeded with it anyway in an effort to intimidate and harass me. I was singled out for selective treatment not because of my conduct, but because I had taken public positions critical of the Governor, the State of Iowa, and the Iowa Department of Human Services.

/s/ Jane Harlan
Jane Harlan, Plaintiff

Subscribed and Sworn to Before Me this 19th day of October, 1987.

/s/ Nancy L. Cox
Notary Public

THE IOWA STATE BAR ASSOCIATION
(SEAL)

Committee on Professional
Ethics and Conduct
Norman G. Bastemeyer, Administrator
1101 Fleming Building
Des Moines, Iowa 50309
1-515-243-3179

August 24, 1987

PERSONAL AND CONFIDENTIAL

Ms. Jane Harlan
Attorney at Law
300 Midtown Building
Newton, Iowa 50208

In Re: Our File No. 8687-189

Dear Ms. Harlan: 87-1350

The above complaint against you came on for consideration by the Committee at its recent hearing meeting.

Following review of the allegations contained in the complaint, your response thereto, the Committee's investigation, and the file, it was the determination of the Committee that you be and hereby are publicly reprimanded for your conduct in making extrajudicial statements relating to the evidence, the character and credibility of the parties and witnesses and your opinion as to the merits of the claims or defenses of parties to a matter in which you appeared as the attorney for certain minor children, in violation of Disciplinary Rule DR 7-107(G); and for your conduct in making statements to the press concerning the judge hearing that matter, in violation of DR 8-102(B).

Your conduct as above described is also in violation of Canon I of the Iowa Code of Professional Responsibil-

ity for Lawyers as well as Disciplinary Rule DR 1-102 (A)(6).

FOR THE COMMITTEE ON
PROFESSIONAL ETHICS AND
CONDUCT

/s/ Norman G. Bastemeyer

NGB/vle
Cert. P 707 166 049

JANE A. HARLAN
Attorney at Law
300 Midtown Building - Newton, Iowa 50208
Phone: (515) 792-9934

September 3, 1987

Carl V. Nielsen
Iowa State Bar Association
1101 Fleming Building
Des Moines, Iowa 50309

Re: File No. 8687-189

Dear Mr. Nielsen:

I have received your letter of reprimand of August 24. Thank you for informing me of the kind of "ethics" valued by the Iowa Bar. Since when did a bunch of outdated unconstitutional ethical rules take priority over the welfare of the children in this state?

The actions of your committee in this matter have done more to discredit the legal profession than anything that I could say or anything that I could do. No, I have no intention of keeping any of your future activities "confidential".

Sincerely,

/s/ Jane Harlan
Jane Harlan

IN THE SUPREME COURT OF IOWA

IN THE MATTER OF	)	
JANE HARLAN,	)	No. 87-1350
A Practicing Attorney	)	ORDER OF PUBLIC
	)	REPRIMAND

Pursuant to Court Rule 118.3 the attached reprimand of attorney Jane Harlan by the Committee on Professional Ethics and Conduct has been filed with the clerk of this court together with proof of service thereof and a statement that no exception has been filed within the time prescribed.

It is therefore ORDERED that the reprimand of Jane Harlan be spread upon the records of this court as a public document.

Dated this 15 day of October, 1987.

THE SUPREME COURT OF IOWA
By /s/ Arthur A. McGiverin
Arthur A. McGiverin, Chief Justice

Copies to:

Members of the Court
Client Security and
Attorney Disciplinary Commission
Norman G. Bastemeyer
James E. Gritzner
Jane Harlan

Certified No. 198055